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CONTRACT FORMATION AND THE FOG OF RECTIFICATION¹

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Rectification of contracts is not, on the face of it, a likely hot topic for legal interest. The speech of Lord Hoffmann in the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd*³ and the judgments of the Court of Appeal in *Daventry District Council v Daventry & District Housing Ltd*⁴ and the views on them expressed in articles by (among others) Professor David McLauchlan⁵ and Professor Paul Davies⁶, as well as in speeches by Lord Toulson⁷ and Sir Nicholas Patten⁸, have now highlighted this area of jurisprudence as one worthy of close and immediate consideration. It is marred by uncertainty and complexity and needs the attention of the Supreme Court.

¹ I am grateful to Koye Akoni and Daria Popescu for their assistance in the preparation of this lecture delivered at UCL on 23 April 2015.. I am also very grateful to Professor Hugh Beale for his comments on an earlier draft of this lecture. I take full and sole responsibility for the views expressed in it. Those views are subject to change in the light of written and oral argument in any future case which may come before me.

² The Rt Hon Sir Terence Etherton, Chancellor of the High Court of England and Wales

³ [2009] UKHL 38, [2009] 1 AC 1101

⁴ [2011] EWCA Civ 1153

⁵ “The ‘Drastic’ Remedy of Rectification for Unilateral Mistake” (2008) 124 LQR 608; “Commonsense Principles of Interpretation and Rectification” (2010) 126 LQR 7; “Refining Rectification” (2014) 130 LQR 83

⁶ “Rectifying the Course of Rectification” (2012) MLR 412

⁷ “Does Rectification Need Rectifying” October 2013, 2013 TECBar Lecture

⁸ “Does the law need to be rectified? *Chartbrook* revisited” Chancery Bar Association Annual Lecture April 2013

The requirements for rectification for common mistake summarised by Peter Gibson LJ in *Swainland Builders Ltd v Freehold Properties Ltd*⁹ were approved by Lord Hoffmann in *Chartbrook*¹⁰, with whose speech all the other members of the appellate committee agreed. They were as follows:

“The party seeking rectification must show that: (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) there was an outward expression of accord; (3) the intention continued at the time of the execution of the instrument sought to be rectified; (4) by mistake, the instrument did not reflect that common intention.”

The circumstances in which the court will grant relief for unilateral mistake have not been the subject of determination by the House of Lords or the Supreme Court. It seems reasonably clear that under current case law rectification for unilateral mistake will not normally be granted unless the defendant knew that the claimant was acting under a mistake when the claimant executed the written contract and the defendant, whether by failing to alert the claimant to the mistake or by some other conduct, has acted in such a way as to make it unconscionable for the defendant to rely on the terms of the written contract and to deny that the contractual term in question was as intended and believed by the claimant¹¹.

The recent cases, articles and lectures to which I have previously referred have raised important and difficult questions. They may be broken down into the following specific matters, which I shall address and some of which inevitably overlap: (1) is the test for rectification for common mistake entirely objective,

⁹ [2002] EGLR 71, 74, para 33

¹⁰ at [48]

¹¹ In *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259 the Court of Appeal suggested that knowledge in this context would extend to certain categories of imputed knowledge and that there might be other examples of sufficiently unconscionable conduct than that mentioned in the text above: see further footnotes x, xx and xxx post

and, if so, (2) what does “objective” mean in this context; (3) if “objective” in this context involves having regard in some instances to subjective intention or belief, can there be rectification for common mistake where the written document has failed to give correct expression to a common subjective intention but there was never any outward expression of accord on the point; (4) are cases like *Chartbrook* and *Daventry* better addressed as cases of rectification for unilateral mistake rather than rectification for common mistake; (5) what difference would it make if they were; (6) what is the correct test for unilateral mistake; (7) what is the proper relationship, if any, between the contract formation rules and rectification?

The modern debate about many of those issues may be said to have started with *Joscelyne v Nissen*¹². The judgment of the Court of Appeal in that case was given by Russell LJ. Its importance is that (1) it confirmed that rectification for common mistake can be granted in the absence of a concluded and binding contract between the parties antecedent to the written agreement which it is sought to rectify and that it is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement¹³; and (2) it stated that “some outward expression of accord is required”.

The Court of Appeal’s judgment in *Joscelyne* was quickly followed by a critical article by Leonard Bromley QC¹⁴ in the *Law Quarterly Review*¹⁵. His thesis, in brief, was that the Court of Appeal had been wrong to state that it is a

¹² [1970] 2 QB 86

¹³ Endorsing the view expressed by Simonds J in *Crane v Hegeman-Harris Co. Inc* [1939] 1 All ER 662 at 664

¹⁴ As pointed out by HHJ David Hodge QC in his excellent book “*Rectification – The Modern Law and Practice Governing Claims for Rectification for Mistake*” (2010) Mr Bromley, who later became HHJ Bromley QC, had appeared as leading counsel for the successful respondent in the House of Lords in *Prenn v Simmonds* [1971] 1 WLR 1381

¹⁵ “Rectification in Equity” (1971) 87 LQR 532

requirement of rectification for common mistake that there was “some outward expression of accord”. He said that rectification is an ancient equitable remedy, which is applicable not only to contracts but to other instruments, and that in none of the formulations of the principle in the many decided cases had there been any requirement of an outward expression. He said that in all those cases, as in equity jurisprudence as a whole, the important issue is the subjective intention of the person concerned and it is entirely irrelevant that “it may be anathema to the common law to consider subjective intention in relation to contracts”. He considered that the presence or absence of an outward expression of accord is relevant only to the question whether the person seeking rectification has discharged the burden of proof. The views expressed in Leonard Bromley’s article have been particularly influential in Australia.

A riposte to Leonard Bromley’s article was given by Marcus Smith QC in an article in the Law Quarterly Review in 2007¹⁶. His thesis was that, contrary to the view expressed by Leonard Bromley, rectification of contracts for common mistake “is concerned *only* with the objective examination of manifest communications passing between the parties to the contract” or communications “crossing the line”¹⁷. In addition to *Joscelyne* and the celebrated horsebeans or feveroles case of *Frederick E Rose (London) Ltd v William H Pim Jn & Co Ltd*¹⁸, he cited a number of cases in support of his proposition. He emphasised that equity’s role is as a supplement, rather than as a rival, to the common law, and he said that it would therefore be “most odd for equity to impose on the parties a reformed contract in cases of mistake

¹⁶ “Rectification of Contracts for Common Mistake, *Joscelyne v Nissen* and Subjective States of Mind” (2007) 123 LQR 116

¹⁷ An expression which Marcus Smith pointed out had been coined by Kerr LJ in *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd (The August Leonhardt)*

¹⁸ [1953] 2 QB 450.

whose terms have been determined by reference to a *different* test to the common law's objectively ascertained *consensus ad idem*".

Marcus Smith's article was followed by an article by Professor David McLauchlan also in the Law Quarterly Review¹⁹. Professor McLauchlan has subsequently published two further articles on rectification in the Law Quarterly Review – one in 2010²⁰ following the decision of the House of Lords in *Chartbrook* and another in 2014²¹ following the decision of the Court of Appeal in *Daventry*. These contain important, substantial and closely reasoned analyses and any summary of them is bound to be inadequate to some degree. Their importance to the debate is, however, such that I must attempt capture the principal elements of his reasoning.

At the core of Professor McLauchlan's reasoning is that (using his own words), whether for common or unilateral mistake, rectification serves, and can only legitimately serve, the purpose of ensuring that the written record of a contract corresponds with the true agreement made by the parties, applying ordinary principles of contract formation.²² He says that the objective approach to determining the existence, content and interpretation of a contract is a fundamental feature of the common law of contract but he emphasises that the actual knowledge and beliefs of the parties are relevant to that approach. Using my own shorthand, this means that (1) rectification of contracts for both common and unilateral mistake depends upon ascertaining the existence and terms of the contract according to the ordinary principles of contract formation

¹⁹ "The 'Drastic' Remedy of Rectification for Unilateral Mistake" (2008) 124 LQR 608

²⁰ "Commonsense Principles of Interpretation and Rectification" (2010) 126 LQR 7

²¹ "Refining Rectification" (2014) 130 LQR 83

²² An analytical approach also endorsed by Professor H Beale in *Chitty on Contracts* (21st ed) Vol 1 para. 5-119

and (2) the objective principle of contract formation does not mean that in all situations the subjective views of the parties are irrelevant.

Professor McLauchlan's analysis of the relevance of subjective intention falls into two broad categories: situations where the parties are subjectively agreed and situations where one of the parties is mistaken.

Professor McLauchlan says that, if both parties are subjectively agreed, there is a contract in accordance with the parties' subjective intentions whether or not there was an outward manifestation of accord. His view is that the objective test is satisfied because a reasonable person in the position of the parties could not infer an intention that is contrary to the actual mutual intentions of the parties.

Turning to the situation where one of the parties, the claimant, is mistaken, Professor McLauchlan says the other party, the defendant, will nevertheless be bound by a contract in accordance with the claimant's intention if the defendant has led the claimant reasonably to believe that the defendant assented to the claimant's understanding of the terms. That, he says, is a straightforward application of the objective principle. It has been described by Professor Andrew Burrows as "promisee objectivity"²³. On this analysis, knowledge of the claimant's mistake is neither necessary nor sufficient. The only issue is whether the claimant was led reasonably to believe that the bargain was concluded on the basis of the terms he or she intended. Rectification applies to bring the written agreement into line with the contract objectively ascertained in that way.

²³ W E Peel and Andrew Burrows (eds), *Contract Terms* (OUP 2007) p. 97

Professor McLauchlan finds that analysis on Blackburn J's well known statement in *Smith v Hughes*²⁴:

“If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, *and that other party upon that belief enters into the contract with him*, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.”²⁵

Under that approach there is a contract in accordance with the promisee's subjective intention if, but only if, the promisee reasonably believes the promisor's intention is that alleged by the promisee. On the other hand, if the promisee knows or ought reasonably to know that the promisor's subjective intention is not the same as the promisor's offer, but purports to accept the offer, there is either no contract or, if the promisee led the promisor reasonably to believe that the contract is in accordance with the promisor's subjective intent, there is a contract in accordance with the promisor's subjective intent.

Professor McLauchlan says that those principles can be illustrated through the well known case of *Hartog v Colin & Shields*²⁶. That was the case where the defendants mistakenly offered to sell Argentine hare skins to the plaintiff at prices quoted “per pound” instead of “per piece”. The plaintiff accepted the offer, intending to buy at the stated price per pound. The defendants did not deliver and the plaintiff sued for damages for breach of contract. Singleton J held that there was no contract because anyone with any knowledge of the trade must have realised that there was a mistake and that the offer made was not the offerors' real intention. Professor McLauchlan says that, on the basis of the judge's findings of fact, if the sellers had delivered the skins, the judge

²⁴ (1871) LR 6 QB 597, 607

²⁵ Professor McLauchlan's emphasis

²⁶ [1939] 3 All ER 566

would have been justified in upholding a claim by the sellers for the price at a rate per piece since the facts supported the further conclusion that the buyer led the sellers reasonably to believe that he had assented to the terms intended by them and that there was therefore a contract in accordance with their understanding.

At this point it is necessary to bring into focus the speech of Lord Hoffmann in *Chartbrook*, with which, as I have said, all the other members of the appellate committee agreed. The facts are well known and I do not propose to set them out here. Having found in favour of Persimmon's interpretation of the contract, it was unnecessary to deal with Persimmon's alternative claim for rectification. Lord Hoffmann did so because it had been "very well and fully argued"²⁷. In the House of Lords Persimmon, relying on Marcus Smith's article and Professor McLauchlan's 2008 article, contended that rectification required a mistake about whether the written instrument correctly reflected the prior consensus, not whether it accorded with what the party in question believed that consensus to have been; and that, in accordance with the general approach of English law, the terms of the prior consensus were what a reasonable observer would have understood them to be and not what one or even both of the parties believed them to be. Lord Hoffmann agreed with that argument.

Now what will be immediately apparent is that, although Persimmon relied upon Professor McLauchlan's 2008 article, Lord Hoffmann's analysis did not adopt its reasoning. It was not a case of common subjective intention: *Chartbrook* and Persimmon always had different subjective intentions. It was a

²⁷ Para. [58].

case where (on the hypothesis on which the rectification claim was being considered) Chartbrook was mistaken as to the pre-contractual consensus and Persimmon was mistaken as to the written contract. Lord Hoffmann did not, however, follow Professor McLauchlan's analysis which would have required him to ask whether Chartbrook had reasonably led Persimmon to believe that the consensus was as Persimmon believed and intended. That was precisely the criticism which Professor McLauchlan subsequently made in his 2010 article.

Furthermore, Lord Hoffmann's analysis is inconsistent with the idea that a common subjective but uncommunicated intention can give rise to particular contractual terms. He said²⁸ that, in the case of both a prior contract and a continuing common intention in relation to a particular matter, the question is what an objective observer would have thought the intention of the parties to be, and he quoted (with apparent approval) the following statement of Denning LJ in *Rose v Pim*²⁹:

“Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties—into their intentions—any more than you do in the formation of any other contract. You look at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed”

In *Daventry* both parties were agreed in the Court of Appeal that Lord Hoffmann's observations on rectification for common mistake correctly stated the existing law. Nor was there any dispute between the parties that the claimant could only obtain rectification for unilateral mistake if the defendant

²⁸ Para [60]

²⁹ [1953] 2 QB 450,461.

was aware of the claimant's mistake and failed to draw the mistake to the claimant's attention. The advocates did not, therefore, make any submissions on any of the published articles or the arguments of principle to which I have referred earlier.

I shall not set out the complicated facts of *Daventry*. It is sufficient to say that the case had some similar features to *Chartbrook* in that the claimant, Daventry District Council ("the Council"), was not mistaken as to the objective meaning of the prior consensus, which reflected what the Council actually intended, but it was mistaken in thinking that the final executed contract reflected its intention. The defendant, Daventry & District Housing Limited ("the Company"), was mistaken as to the objective meaning of the prior consensus but it correctly believed that the final executed contract gave effect to its actual intention. Following Lord Hoffmann's analysis in *Chartbrook*, the majority (Lord Neuberger and Toulson LJ) allowed the Council's appeal and ordered rectification so as to bring the executed written contract into line with the objective prior consensus. The other judge (myself) would have dismissed the appeal on the ground that (1) there was no continuing objective consensus because, by the time the contract was executed, the Company had clearly indicated to the Council that the Company intended to contract on different terms to those previously objectively agreed, and (2) rectification for unilateral mistake was not available because of the trial judge's finding of fact that the Council had failed to prove that the Company's agent had been dishonest.

In the course of my judgment I set out what I understood Lord Hoffmann's analysis of the law of rectification for common mistake to be, and I gave examples of some factual situations and said how I considered the law of

rectification would apply to them. I concluded that the examples showed why it is good policy to favour objective accord or objective change of accord over subjective belief and intention³⁰. Lord Neuberger said he agreed with those examples³¹. The broad thrust of his remarks was that he thought I had correctly analysed the law on rectification for common mistake according to Lord Hoffmann's objective analysis, but that, without Lord Hoffmann's analysis, he might well have thought the case should be dealt with as one for unilateral mistake and he might have granted rectification on that ground.

Toulson LJ referred to Professor McLauchlan's 2008 and 2010 articles and said that he found them particularly helpful³². He postulated a situation in which A and B enter into a non-binding agreement meaning X, which is what A believes and intends but B intends and believes it to mean Y, and the written contract means Y, and there is no question of either being aware of the other's mistake and neither behaves in such a way as to mislead the other. Toulson LJ said that in such a situation he shared Professor McLauchlan's difficulty in seeing why it should be right to grant rectification to A and so holding B to a contract which B never intended to make and never misled A into believing B intended to make. It seems clear, therefore, that but for Lord Hoffmann's analysis in *Chartbrook*, Toulson LJ would have dealt with *Daventry* as a case of rectification for unilateral mistake³³.

In relation to rectification for unilateral mistake, Toulson LJ said³⁴ that he was conscious that there is authority that the test is one of honesty, and that

³⁰ Paras [79] to [89]

³¹ Para [227]

³² Para [173]

³³ Indeed, he expressly stated that at the end of his judgment at para [185]

³⁴ At para [184]

nothing less than knowledge in the sense of one of Peter Gibson J's first three categories in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA (Note)*³⁵ will be sufficient³⁶. He said that he was not sure that the legal principle is or should be so rigid. He referred to the suggestion of Sedley LJ in *George Wimpy UK Ltd v VI Construction Ltd*³⁷ that a test of "honourable and reasonable conduct" would be preferable and said that words like "honourable and reasonable" are imprecise but he was inclined to agree with Sedley LJ's observation³⁸ that "sharp practice has no defined boundary".

In his 2014 article Professor McLauchlan described *Daventry* as "one of the hardest contract cases" he had read. Consistently with his views on *Chartbrook*, he considered that the case was not one of common mistake and that, although the Council was correct about the prior consensus, it should have been refused rectification because the Council was not reasonably entitled to believe, at the time the formal written contract was executed, that the Company was assenting to the Council's understanding.

Although Toulson LJ, for obvious reasons, got off rather lightly, Professor McLauchlan's commentary on the case was highly critical. His most severe criticism was reserved for my own endorsement of Lord Hoffmann's analysis in *Chartbrook* and my support for, and illustration of the operation of, the objective principle for rectification for common mistake. He described part of my reasoning as "difficult to comprehend". I do take a crumb of solace from

³⁵ [1993] 1 WLR 509

³⁶ (1) actual knowledge; (2) wilfully shutting one's eyes to the obvious; and (3) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make

³⁷ [2005] BLR 135 paras [56]-[57]

³⁸ at para [65]

the fact that his conclusion that the Council's claim ought to have failed was the same as my own dissent from the majority³⁹.

What is apparent from all this is that the law on rectification for common and unilateral mistake is in need of comprehensive consideration at the highest level.

The first issue to consider is whether *Chartbrook* should be followed in the Court of Appeal and below. In his 2013 TECBar Lecture⁴⁰ Lord Toulson indicated that he was not sure that the lower courts should consider themselves bound by the reasoning on rectification in *Chartbrook*⁴¹. I respectfully do not agree with the suggestion that Lord Hoffmann's reasoning is not binding on the lower courts, although I recognise, as Lord Neuberger and I did in *Daventry*, that it will need to be refined in the light of new and different factual scenarios. Certainty, predictability and consistency are essential to the Rule of Law. A free-for-all by the lower courts in this area would be highly undesirable and, in my view, wrong. Although not essential to the outcome of the case, Lord Hoffmann's reasoning and decision on the rectification issue in *Chartbrook* was formed after full argument before the appellate committee. All the other members of the committee agreed with his speech. For better or worse, I expressly stated in *Daventry* that I considered Lord Hoffmann's observations to be a correct and principled statement of the law on rectification for common mistake and set out what I believed to be the consequences⁴². Lord Neuberger, again for better or for worse, expressly stated that he agreed with my analysis of

³⁹ A similar conclusion was reached in Paul Davies in "Rectifying the Course of Rectification" (2012) MLR 412

⁴⁰ "Does Rectification Need Rectifying" October 2013

⁴¹ The same doubt was expressed by Paul Davies in "Rectifying the Course of Rectification" (2012) MLR 412

⁴² Paras [78] to [90]

the law⁴³. I agree, therefore, with the statement of Sir Nicholas Patten in his 2013 Chancery Bar Association Annual Lecture⁴⁴ that, in the light of what was said in *Daventry* as representing the law, the decision in *Chartbrook* on rectification is binding precedent.

It follows that, as the law presently stands, whether the claimant for rectification relies upon a prior oral contract or a non-binding continuing common intention, the claimant cannot succeed merely on proof of an uncommunicated intention and belief shared by all the parties to the contract. Contrary to judicial observations in some cases⁴⁵, an outward expression of accord is not merely of evidential value in discharging the burden of proof on the claimant for rectification. It is an essential requirement of rectification for common mistake.

It also follows that, as the law presently stands, a claimant is entitled to rectification for common mistake if both parties mistakenly thought that the written contract gave effect to a prior objective consensus, even if the written contract reflected the actual intention and belief of the defendant (because he or she had been mistaken about the prior consensus).

The law on rectification for unilateral mistake was not affected by anything in *Chartbrook* or *Daventry*. The decision on rectification in each of those cases was based on rectification for common mistake. Lord Hoffmann said nothing in *Chartbrook* about rectification for unilateral mistake. Toulson LJ and, possibly, Lord Neuberger made some observations in *Daventry* about rectification for

⁴³ Para [227]

⁴⁴ “Does the law need to be rectified? *Chartbrook* revisited” April 2013

⁴⁵ For example, *Munt v Beasley* [2006] EWCA Civ 370 at [36] (Mummery L.J. with whom Scott Baker L.J. and Sir Charles Mantell agreed); cf *Day v Day* [2013] EWCA Civ 280 in relation to rectification of a voluntary settlement

unilateral mistake which might indicate to some observers a desire to deviate from existing principles but they did so in the most tentative way and were plainly not expressing any concluded view.

I therefore turn to the really interesting and challenging question, which is whether the Supreme Court should determine, in the event that it has the opportunity to do so, that the existing jurisprudence is incorrect. In this connection, I shall limit myself to the seven issues I mentioned at the outset of this address.

I consider, first, rectification for common mistake. There is undoubtedly a significant and impressive body of judicial and academic opinion in favour of the view that rectification for common mistake should not depend on a wholly objective test. In particular, there is considerable support for the view that (1) rectification should be an available remedy where there was a common but uncommunicated belief and intention of all the parties which was not reflected in the written document, and (2) cases like *Chartbrook* (on the hypothesis that Persimmon was seeking rectification) and *Daventry* should be decided as cases of unilateral mistake and not common mistake since, at the time of execution of the written contract, the defendant in such cases correctly believed that it gave effect to the defendant's actual intention and executed it intending that it should do so. Among doubtless many others, those are the views of Lord Toulson, Lord Justice Patten, Professor McLauchlen, Professor Paul Davies and HHJ David Hodge QC.

My starting point is to acknowledge the force and logic of Professor McLauchlan's fundamental point that rectification is intimately bound up with

the rules of contract formation and interpretation. His thesis has made an important contribution to the debate. I freely confess that I have only recently come to focus on this approach and its importance. I agree with Professor McLauchlan that it is the correct approach. It inevitably flows from the well-established principle that equity does not make contracts. Equity modifies and refines the common law but it cannot create a contract which never existed at common law or negate one where there has been no wrongdoing⁴⁶. It is entirely consistent with the comment of Denning LJ in *Rose v Pim* that rectification is concerned with contracts and documents and that, if you can predicate with certainty what the contract was, and that it was, by a common mistake, wrongly expressed in the document, then you can rectify the document; but nothing less will suffice⁴⁷.

Accordingly, I agree with Professor McLauchlan that the answer to the question whether there can be rectification based on a common but uncommunicated actual consensus turns on whether a term can ever be contractually binding in the case of such an uncommunicated subjective consensus. I suggest that, as a bald statement of principle shorn of all the factual complexities of an actual case, there are strong policy objections to the recognition of such a contract term. To extend contractual force to the uncommunicated subjective belief and intention of both parties is not at all consistent with the objective principle, which has been a hallmark of the law of

⁴⁶ The classic statement is that of James V-V in *Mackenzie v Coulson* (1869) LR 8 Eq 368 at 375: "Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts." An equitable jurisdiction to rescind a contract for common mistake was held not to exist in *Great Peace Shipping Ltd v Tsavliris Salvage Ltd* [2002] EWCA 1407; [2003] Q.B. 679 (CA)

⁴⁷ [1953] 2 QB 450 at 461

England and Wales and is so important to its commercial and trading traditions. It is inconsistent with the basic principle that, to enter into a contract, there must be a communicated offer. The only relevant communication, however, in the scenario currently under consideration is the final written contract and that contains the term for which the defendant contends.

I do not dispute that an attractive case can be made for a policy which gives contractual force and permits rectification in respect of a term which both parties actually intended, albeit uncommunicated, and which by mistake has been omitted from the final written contract. Take, for example, the converse factual situation in which A and B agree heads of term which provide X although both parties intended it to provide Y and the final written contract prepared by solicitors provides Y. There are many who would say that it would be quite wrong for one of the parties, who with changed circumstances now thinks that X would be to their advantage, to obtain rectification to bring the written contract into line with the antecedent heads of agreement.

There are, however, important pragmatic matters to consider. Let us postulate a situation, as mentioned above, where the claimant is alleging that the written contract does not reflect the intention of any of the parties to it. on a point on which they never outwardly expressed any agreement. The defendant is denying that their intention was different from the actual terms of the written contract. The contract itself works, any ambiguity being resolved in favour of the most commercial sense, and nothing has gone obviously wrong with its language for otherwise the mistake could be corrected by interpretation in accordance with the broad interpretative powers of the court following cases

such as *Investors' Compensation Scheme Ltd v West Bromwich Building Society*⁴⁸, *Chartbrook* and *Kookmin Bank v Rainy Sky SA*⁴⁹. Those are not promising circumstances for the claimant to discharge the burden of proving to the requisite standard⁵⁰ that the defendant is not telling the truth about his or her own subjective intentions and belief or the subjective intentions and belief of the person or persons through whom the defendant is alleged to have acquired the benefit or burden of the contract and that there was a common mistake when the written contract was made.

The claimant in such circumstances is hardly likely to succeed on oral evidence alone. Assuming the claim survives an application to strike it out as hopeless, the claimant will require disclosure of material which they consider will throw light on the subjective intention of the defendant or of the person or persons through whom the defendant derives his or her rights or obligations under the contract. The cost, complexity and time consuming consequences of disclosure in commercial litigation, particularly of electronic communications, are notorious. They prolong litigation and add considerably to litigation costs. I question whether those who use our courts to resolve commercial litigation would really wish there to be a legal policy which permits such speculative litigation with all its consequences. The policy considerations of precluding litigation of this kind seem to me to be even stronger than the policy considerations for excluding evidence of pre-contractual negotiations for

⁴⁸ [1998] 1 WLR 896

⁴⁹ [2010] EWCA Civ 582

⁵⁰ See *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 50.

drawing inferences about what a contract means, a policy which the Supreme Court refused to abandon after full argument in *Chartbrook*⁵¹.

Can it really be said that the current legal policy of precluding such a claim based entirely on uncommunicated subjective intentions is so manifestly wrong or inferior to the alternative that the law should now be changed? I doubt it. I would add, as must be obvious, that this entire issue of an uncommunicated subjective consensus is only relevant in the event of a dispute. Plainly, if both parties are content to proceed on the basis of their actual subjective intentions, irrespective of the mistaken terms of the written contract, they do not need to go to court. They can, if need be, amend the contract by agreement. Alternatively, no doubt the facts will give rise in due course to an estoppel, most likely an estoppel by convention.

The next issue is whether cases such as *Chartbrook* and *Daventry* are better addressed as cases of unilateral mistake. My starting point is again, in agreement with Professor McLauchlan's thesis, to look at the contract formation principles. It is clear that if A offers to sell to B for X, intending Y, and B accepts the offer of X, intending and reasonably believing that the offer is for X, there is a contract for X. It is therefore elementary that, if that is what has been orally agreed and is not "subject to contract" and the agreement is then put into a written document providing for X, A is not entitled to rectification even though he or she subjectively intended Y. If the formal written document says Y, B is entitled to rectification of the written document in order to give effect to the contract. That is a straightforward application of

⁵¹ At paras [28] to [47]

the objective principle and I am not aware of anybody who would contend to the contrary.

Should it make any difference if the consensus was “subject to contract” and B at all times up to the formal written contract for Y reasonably believed the agreement was for X? There are reasonable arguments either way. On the one hand, those who favour a unilateral mistake analysis would argue that it is wrong in principle to favour an antecedent non-contractual consensus for X over a subsequent written contract for Y which gave effect to the defendant’s actual intention at the time the contract was made. Others, who favour a common mistake approach, would say it is inconsistent to have different provisions in the antecedent non-contractual consensus and the later written contract if there has been no change in the intention and belief of the parties as to the contract terms, let alone any communication or outward manifestation of any such change, prior to the written contract itself. The latter position was precisely the situation in *Chartbrook* since there was no suggestion in that case that Persimmon at any stage prior to the formal contract knew or ought to have known that Chartbrook did not intend to contract in accordance with the “subject to contract” consensus. On the approach of the majority, *Daventry* was the same type of situation.

For my part, I think it is right that in this type of factual scenario the focus is not on the subjective state of mind of the mistaken party at the time of the written contract but rather it is on the prior objectively ascertained consensus which never changed and to which both parties objectively always continued to adhere. That approach, that is to say one of rectification for a common mistake, seems to me to be more consistent with an analysis which looks at the

problem through the prism of the contract formation rules. Certainly, it does not seem to me to be so egregious an error of principle or policy that the unanimous approach of the appellate committee in *Chartbrook* on the point should be overturned.

I do not accept that the rectification scenario under consideration in *Chartbrook* and *Daventry* was not one of common mistake merely because the mistake of each party was a different mistake. It is sufficient that there was a common mistake that the final written agreement reflected the prior consensus. This debate about terminology is, in any event, a distraction and unprofitable. The important issue is the proper application of the standard principles of contract formation and interpretation.

This brings us to what is arguably, in terms of analysis, the least satisfactory area of the jurisprudence in relation to rectification, namely rectification for unilateral mistake. In particular, there is no adequate explanation of the relationship between rectification where the claimant alone has been mistaken and the contract formation rules.

Basing himself on Blackburn J's statement in *Smith v Hughes*, Professor McLauchlan says that the touchstone for rectification in a case of unilateral mistake is whether or not the defendant reasonably led the claimant to believe that the defendant was accepting the contract term subjectively intended by the claimant. If so, there is a contract on the terms intended by the claimant and, logically, the claimant ought to be entitled to rectification to bring the written document into line with the contract.

That, however, is not the current jurisprudence. As I said at the outset of this address, rectification for unilateral mistake will only be ordered where the defendant was aware of the claimant's mistake⁵² and has been guilty sufficiently unconscionable conduct as would make it inequitable for the defendant to resist rectification⁵³. The consistently stated reason for that high hurdle is that the circumstances must be exceptional to impose on the defendant a contract which he or she did not and never intended to make and where he or she made no mistake in executing the written contract⁵⁴.

It is apparent that there are two inconsistent legal policies or principles in issue. The justification I have mentioned for the strict equitable rule is clear and rational and has been consistently stated in the case law and by commentators. It is necessary, therefore, to have a critical look at the correctness and desirability of what is said to be the common law rule based Blackburn J's statement of (what has now been called) "promisee objectivity" in his obiter statement in *Smith v Hughes*. That was in contrast to the "detached" objectivity approach which is the more usual English law principle applicable to both the formation and the interpretation of contracts.

⁵² It was suggested in *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259 that knowledge in this context extends to wilfully shutting one's eyes to the obvious and wilfully and recklessly failing to make such enquiries as an honest and reasonable man would make (ie Peter Gibson J's categories (2) and (3) in *Baden*) and that rectification may be possibly be granted in a situation where, even though the defendant did not have actual knowledge of the claimant's mistake, the defendant so conducted himself that he diverted the defendant's attention from discovering the mistake by making false and misleading statements, and the defendant in fact made the very mistake that the claimant intended.

⁵³ This is a sufficient description for present purposes although the judicial pronouncements on the requirements for rectification for unilateral mistake are not all entirely consistent: see and contrast, for example, the language used in *A. Roberts & Co v Leicestershire CC*, *Riverlate Properties Ltd v Paul* [1975] Ch 133 and each of the judgments in *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 50; and see generally Hodge op cit. Chpt 4.

⁵⁴ See the often cited statement of Blackburne J in *George Wimpey UK Limited* [2005] EWCA Civ 77 at [75].

It certainly seems odd that where one party is mistaken there should be different principles of objectivity applicable to the formation of contracts (“promisee objectivity”), on the one hand, and contractual interpretation (“detached objectivity”), on the other hand, not least because there comes a point when the question of formation overlaps or merges with that of interpretation, that is to say in deciding whether there has in fact been agreement on the same terms in relation to the same subject matter. Moreover, the only authority cited by Blackburn J for his obiter observation was *Freeman v Cooke*⁵⁵, which was not a case about contract at all. It was an action for trover in relation to goods and the issue was whether there was a defence based on estoppel. The question, in short, was whether the plaintiffs as assignees of a bankrupt, who had told the officers of the defendant sheriff before the bankruptcy that certain goods did not belong to him but to third parties, were estopped from making a claim in trover against the sheriff for conversion of the goods as a result of the officers seizing the goods. It was held that the plaintiffs were not estopped.

I confess that I have difficulty in seeing how the facts or the reasoning of Parke J in *Freeman v Cooke* were a proper basis for Blackburn J’s statement in *Smith v Hughes*, let alone a sound jurisprudential foundation for a principle of “promisee objectivity” in the formation of contracts. What I certainly can understand, on the other hand, consistently with the principles of estoppel discussed in *Freeman v Cooke*, is that there may be circumstances in which a defendant is estopped by their unconscionable conduct from denying that the terms of the contract are other than in accordance with the subjective intention

⁵⁵ (1848) 2 Ex 654

of the claimant even though that conflicts with the express literal terms of the contract. That is indeed the way in which the modern cases of rectification for unilateral mistake, which lay down the test, are properly to be analysed. That was the approach of Pennycuik J. in *A Roberts & Co Ltd v Leicestershire CC*⁵⁶, which is where the modern law of rectification for unilateral mistake may be said to have begun and in which rectification was granted on the basis of the following principle stated in *Snell on Equity*⁵⁷ :

“By what appears to be a species of equitable estoppel, if one party to a transaction knows that the instrument contains a mistake in his favour but does nothing to correct it, he (and those claiming under him) will be precluded from resisting rectification on the ground that the mistake is unilateral and not common.”

It is difficult to envisage circumstances in which the defendant’s knowledge of the claimant’s mistake will not of itself be sufficient to give rise to an equitable estoppel. Whether rectification would reduce a contractual burden on the claimant or would confer on the claimant an additional benefit, enforcement by the defendant of the unrectified contract would cause a detriment to the claimant that would not have been suffered but for the unconscionable acquiescence of the defendant in the claimant’s mistake.

The effect of the estoppel is, analytically, to turn a unilateral mistake into a common mistake: the estoppel operates to preclude the defendant from denying that (1) there was a consensus in the terms intended by the claimant and (2) there was a common mistake that the written agreement gave effect to that consensus. In this way, and if “promisee objectivity” is rejected as having

⁵⁶ [1961] Ch 555

⁵⁷ (25th ed) (1960). This description of the principle is maintained in the 32nd ed but in different language: see 16-019. A similar position is taken by Hodge, *op. cit.*, at para. 4.22. This approach also found favour with Robert Megarry QC in a contemporary note on *Roberts* in (1961) 77 LQR 313.

no sound jurisprudential basis, there is coherence between the contract formation principles, rectification for common mistake and rectification for unilateral mistake. In the case of both common and unilateral mistake, rectification is ordered for the sole purpose of bringing the written document into line with the contract.

That leaves for consideration those cases where, on the face of it, there was agreement on the same terms in relation to the same subject matter but the claimant, who seeks to enforce those terms, ought reasonably to have appreciated that the defendant intended to contract on different terms. Our jurisprudence currently holds that there is no contract in such a case⁵⁸. That seems to me to be a fair and principled outcome and, it is strongly arguable, is consistent with the usual detached objectivity approach of our law to contract formation and interpretation⁵⁹.

It could be said that, where the claimant ought reasonably to have been aware that the defendant was mistaken, then on a detached objectivity approach there ought to be a different outcome according to whether or not the claimant also ought reasonably to have been aware of the actual term subjectively intended by the defendant. If it was not unreasonable for the claimant too be unaware of the actual term subjectively intended by the defendant, even though the claimant ought to have been aware that the defendant was making some kind of mistake, there is a strong case for saying that an outcome of no contract is both consistent with detached objectivity and good policy. If, however, the claimant ought reasonably to have been aware of the actual term subjectively intended by the defendant, but accepted the defendant's offer without demur,

⁵⁸ *Hartog v Colins & Shields* [1939] 3 All ER 566

then it may be said that, on a detached objectivity approach, there should be a contract on the term subjectively intended by the defendant. That would be going even further in favour of the mistaken party than Blackburn J in *Smith v Hughes*. The answer to the point is that it is most likely that such cases will fall within the second and third categories of notice in *Baden* (and so there would be an estoppel binding on the claimant), and that would be the better way of treating them.

Accessibility, coherence and consistency are the hallmarks of good jurisprudence. All who care about the law should be grateful to Professor McLauchlan for making us confront their notable absence from this area of the law even if we find it difficult to agree on the solution.

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